79-435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. A-1105

IMPERIAL IRRIGATION DISTRICT, ET AL., *Petitioners,*

v.

BEN YELLEN, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REGINALD L. KNOX, JR.
HORTON, KNOX, CARTER & FOOTE
Law Building, Suite 101
895 Broadway
El Centro, California 92243
(714) 352-2821

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
WILLIAM H. BURCHETTE
LAW OFFICES OF NORTHCUTT ELY
Watergate 600 Building
Washington, D.C. 20037
(202) 342-0800

Attorneys for Imperial Irrigation District

Of Counsel:

CHARLES E. CORKER
4128 55th Avenue, N.E.
Seattle, Washington 98105
(206) 523-9264

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Petitioner Imperial Irrigation District ("the District") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

The Court of Appeals' decision as to the powers and duties of the Secretary of the Interior in the administration of the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. § 617 *et seq.*, is in serious conflict with the opinion and decrees of this Court in *Arizona* v. *California,* ordering the satisfaction of water rights per-

fected under state law prior to the effective date of the Project Act, and determining their quantities and priorities.

This Court has directed that the Secretary shall so operate Hoover Dam and the All-American Canal as to deliver water in satisfaction of rights in Colorado River water which were perfected under state law prior to enactment of the Project Act. It has further determined that, in the case of Imperial Irrigation District, the area so irrigated (for at least 50 years now) is 424,145 acres, and that the quantity of water diverted, under appropriations made at least 78 years ago, was 2,600,000 acre-feet annually at the time when the Project Act became law. This water is now supplied by the United States through the All-American Canal, pursuant to the Project Act.

But the Court of Appeals' decision, if allowed to stand, would have the effect of requiring the Secretary to reduce his deliveries to the District to far less than 2,600,000 acre-feet per year, for the irrigation of much less than 424,145 acres. This is because he is told to refuse to deliver water for the irrigation of land in excess of 160 acres per landowner, unless the owner agrees to sell at prices fixed by the Secretary of the Interior. (See the Appendix at p. 244a for the affidavit of the principal respondent, a potential buyer, which gives an idea of the windfall he is expecting.) The court quotes an estimate that 233,000 acres are in this category. It concedes that the Secretary cannot compel the landowners to sell (and neither can the District), but believes that many will do so.

The Court of Appeals believes that under California law the landowner has no vested right appurtenant to

the land (we think that this conflicts not only with California law but also with § 8 of the Reclamation Act of 1902), and therefore the District can "redistribute" the water taken away from lands that were irrigated before there was a Project Act. Aside from the legal barriers to doing so, there is no place where the District can put any of the water so "redistributed," because all irrigable land in the District is already being watered.

The Court of Appeals' decision would not only overturn 34 years of administrative practice, during the administrations of six successive Secretaries of the Interior, and four Presidents, to the effect that the excess land restrictions in the reclamation laws do not apply to present perfected rights under the Project Act; it would also overturn the Department's more general practice throughout the 17 Western States, adhered to until recently, that § 8 of the Reclamation Act of 1902 requires that water be permitted to "flow through" reclamation works to supply water rights previously vested under state law, irrespective of acreage.

OPINIONS BELOW

The principal opinion of the Court of Appeals is reported at 559 F.2d 509 (9th Cir. 1977), and is reproduced in the Appendix at p. 1a. The opinion of the Court of Appeals modifying its principal opinion and denying the District's petition for rehearing is reported at 595 F.2d 524 (9th Cir. 1979), and is reproduced in the Appendix at p. 64a. The opinion of the District Court is reported at 322 F. Supp. 11 (S.D. Cal. 1971), and is reproduced in the Appendix at p. 78a. The order of the District Court denying the mo-

tion of respondents for leave to intervene after judgment to prosecute an appeal is unreported and is reproduced in the Appendix at p. 112a. The decision of the Court of Appeals reversing that order of the District Court is an appendix to the opinion of the Court of Appeals, 559 F.2d, at p. 543, and is reproduced in the Appendix at p. 62a.

JURISDICTION

The judgment of the Court of Appeals was entered August 18, 1977, and was subsequently modified by an order entered April 23, 1979, which denied the District's petition for rehearing. On July 3, 1979, Justice Rehnquist granted an extension of time to September 14, 1979, in which to file this petition for certiorari. The jurisdiction of the Supreme Court is invoked under § 1254(1) of the Judicial Code, 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether the Boulder Canyon Project Act and this Court's decree in *Arizona* v. *California*[1] require the delivery of water in satisfaction of "present per-

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[1] The 1979 decree, — U.S. —, 99 S. Ct. 995, entered pursuant to stipulation among the United States, Arizona, California, Nevada, and a number of California parties, including the District, adjudicated "present perfected rights" of specified entities in the three States. The District's present perfected rights were stated as follows:

> "*The Imperial Irrigation District* in annual quantities not to exceed (i) 2,600,000 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of 1901." *Id.*, at —, 99 S. Ct., at 1000.

fected rights"[2] on privately owned lands in excess of 160 acres?

2. Whether principles of finality preclude the reversal of administrative[3] and judicial[4] determinations that vested water rights are not subject to impairment by the excess land provisions of the reclamation law?

3. Whether an alleged "desire" to buy land at less than its market value at prices to be fixed by the Secretary of the Interior under § 46 of the Omnibus Adjustment Act of 1926 creates standing to intervene and to appeal from a district court judgment against the United States from which the United States did not appeal? And, if so, whether such standing ceases upon the termination of the Secretary's authority to fix prices for excess lands, during the pendency of the appeal?[5]

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[2] The 1964 decree in *Arizona* v. *California*, 376 U.S. 340, defines "perfected rights" and "present perfected rights" as follows:

> "(G) 'Perfected right' means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;
>
> "(H) 'Present perfected rights' means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act . . . ." *Id.*, at 341.

[3] See the determination of Secretary of the Interior Ray Lyman Wilbur, reproduced in the Appendix at p. 213a.

[4] See the findings of fact, conclusions of law, and judgment of the Superior Court of the State of California in the in rem validation proceeding, *Hewes* v. *All Persons*, reproduced in the Appendix at p. 120a. See the Appendix at p. 247a for the administrative practice of the Interior Department from 1931 to 1967.

[5] Section 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649, as amended, 70 Stat. 524, 43 U.S.C. § 423(e), under which this

STATUTORY PROVISIONS INVOLVED

Relevant extracts from the statutes and compact involved are printed in the Appendix beginning at page 155a. They are:

Boulder Canyon Project Act, 45 Stat. 1057, §§ 1, 4(a), 4(b), 5, 6, 8, 9, 12, 13, 14 and 18, 43. U.S.C. §§ 617, c(a), c(b), d, e, g, h, k, *l*, m, and q.

Colorado River Compact, 70 Cong. Rec. 324 (1922), Art. VIII, H Doc. 717, 80th Cong., 2d Sess., p. A19.

Colorado River Basin Project Act, 82 Stat. 885, § 301(b), 43 U.S.C. § 1521(b).

Act to Provide for the Application of the Reclamation Law to Irrigation Districts, 42 Stat. 541, § 1, 43 U.S.C. § 511.

Reclamation Act of 1902, 32 Stat. 388, §§ 3, 5 and 8, 43 U.S.C. §§ 372, 383, 392, 416, 431, 432, 434, and 439.

Omnibus Adjustment Act of 1926, 44 Stat. 636, as amended, 70 Stat. 524, § 46, 43 U.S.C. § 423(e).

Judicial Code, 62 Stat. 689, § 1738, 28 U.S.C. § 1738.

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action was brought, provides that "[U]ntil one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary . . . ." More than one-half of the construction charges had been fully paid by March 1, 1978, while this case was being considered by the Court of Appeals, and the court was so advised. See the Appendix at p. 243a.

STATEMENT OF THE CASE

This suit was instituted by the United States against Imperial Irrigation District at the request of the Secretary of the Interior in 1967. The Secretary sought a declaratory judgment that the acreage limitation[6] provisions of the reclamation law apply to privately owned lands in the District which receive Colorado River water through the All-American Canal. Relying particularly on § 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 699, as amended, 70 Stat. 524, 43 U.S.C. § 423e, he asserted authority to refuse delivery of water to such lands in excess of 160 acres per individual landowner, unless the land owner would agree to sell at prices fixed by the Secretary.

In bringing this action, the United States sought to reverse a determination made 34 years earlier by Secretary Ray Lyman Wilbur. During the negotiation of the contract between the United States and the District for delivery of water and repayment of the cost of the All-American Canal, Secretary Wilbur determined that

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[6] The term "acreage limitation" is a species of statutory limitation on the amount of irrigable land in single ownership that is eligible to receive project water from federal reclamation projects. Various statutes provide for acreage limitations in overlapping and sometimes inconsistent terms. These include: the Reclamation Act of 1902, §§ 3, 5, 32 Stat. 388-89 (1902), 43 U.S.C. §§ 416, 432, 434; Act of February 2, 1911, 36 Stat. 895, 43 U.S.C. § 374; Warren Act, § 2, 36 Stat. 926, 43 U.S.C. § 524; Act of July 24, 1912, 37 Stat. 200, 43 U.S.C. § 449; Act of August 9, 1912, § 3, 37 Stat. 266, 43 U.S.C. §§ 543, 544; Act of August 13, 1914, § 12, 38 Stat. 689, 43 U.S.C. § 418; Act of August 11, 1916, § 5, 39 Stat. 508, 43 U.S.C. § 627; Act of August 11, 1916, § 6, 39 Stat. 508, 43 U.S.C. § 628; Act of January 25, 1917, §§ 1-4, 39 Stat. 868; Act of May 20, 1920, 41 Stat. 605, 43 U.S.C. § 375; Omnibus Adjustment Act of May 25, 1926, 44 Stat. 649, 46 U.S.C. § 423e; and Act of October 14, 1941, 54 Stat. 1119, 16 U.S.C. § 590z-2(c)(5).

federal law does not authorize the application of acreage limitations to privately owned lands in the District having vested water rights. This determination was subsequently embodied in a formal ruling by the Secretary.[7] It was confirmed in a final judgment of a California state court of competent jurisdiction in proceedings to validate that contract. These validation proceedings were required by federal statute. 42 Stat. 541, 43 U.S.C. § 511. The District Court found that this ruling had been adhered to by six successive Secretaries in the administrations of four Presidents.[8]

John M. Bryant and certain other landowners intervened as defendants on their own behalf and as representatives of a class comprised of all persons (some 800 in number) owning more than 160 acres of irrigable land within the District.

Ben Yellen and the other individual respondents reside within the District but own no farmland. They allege a desire to buy land from the present owners at prices substantially below market values, and that they would be able to do so if the present owners were denied water from the All-American Canal unless they agreed to sell their excess lands at prices established

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[7] Secretary Wilbur's determination (reproduced in the Appendix at p. 213a), the validation proceedings (reproduced in the Appendix at p. 120a), and the administrative practice of successive Secretaries (see the Appendix at p. 247a) are reviewed in Part II of "Reasons for Granting the Writ."

[8] The District Court identifies them as Secretary Ickes under Presidents Roosevelt and Truman; Secretaries Krug and Chapman under President Truman; Secretaries McKay and Seaton under President Eisenhower. It added: "During his tenure under President Kennedy, Secretary Udall did not disturb the interpretation." 322 F. Supp., at 26, n.30.

by the Secretary.[9] Respondents do not allege that they have any statutory preference as against other potential purchasers, wherever resident, arising from respondents' residence in Imperial Valley. Nor do they allege that excess landowners can be compelled to sell, or that, if landowners do sell, they would be obliged to deal with respondents. Theirs is not a class action.

Historical Background

Imperial Irrigation District, an agency of the State of California, is located in the southeastern corner of California, adjacent to the Mexican border.

Irrigation commenced in Imperial Valley in 1901. The water was diverted from the Colorado River at a point in California, and transported via the privately owned Alamo Canal through Mexico and back into Imperial Valley.[10] This water was delivered from the Alamo Canal through 1,700 miles of privately owned

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[9] Dr. Yellen filed an affidavit in the District Court in support of his motion to intervene in which he said:

> "5. If the Government had prevailed in this litigation, the Applicants and persons similarly situated would attempt to purchase the excess lands under the terms and conditions set by the Secretary of the Interior.
>
> "6. I am acquainted with the cost of land within the Imperial Irrigation District. Land that is without water has a market value and sells for approximately $25.00 to $50.00 per acre. Land that is irrigated with federal reclamation water by the Imperial Irrigation District has a value and sells for between $1200.00 to $1400.00 per acre." Record, p. 169-170. This affidavit is reproduced in the Appendix at p. 244a.

[10] The history of irrigation in Imperial Valley is summarized in the District Court's opinion, 322 F. Supp., at 12-15, and in this Court's opinion in *Arizona* v. *California*, 373 U.S. 546, 553 (1963).

main and lateral canals to lands [11] in the Valley. These pre-1929 appropriations in Imperial Valley, and uses of water associated therewith, gave rise to the "present perfected rights" involved in this controversy.

Since 1942, all water delivered to the District has been delivered through the All-American Canal, constructed by the United States as a substitute for the Alamo Canal under the authority of the Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. §§ 617 *et seq.* This Act also authorized the construction of Hoover Dam and gave the consent of Congress to the Colorado River Compact, subjecting all rights of the United States and those claiming under it to the Compact. Section 6 of the Project Act expressly requires that the Secretary operate the project so as to satisfy present perfected rights. *The Project Act makes no mention of acreage limitations on private lands,* although it expressly limits entries on *public* lands to 160 acres. Section 14 incorporates by reference unspecified parts of the reclamation law, but such incorporation is specifically limited to the extent that it does not conflict with the express provisions of the Project Act.[12] And the Project Act's legislative history, in which the sub-

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[11] These are the lands involved in this litigation. 233,000 acres, or 55 percent of the 424,145 acres irrigated prior to the Project Act, are said by the Court of Appeals to be owned by "excess landowners." 595 F.2d, at 530, n.6. Respondents do not allege that the present landowners are the same people who owned these lands in 1929, or that there has not been a "break-up" of large 1929 holdings, with subsequent sales and resales of acreage in various sizes.

[12] "Sec. 14. This act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, *except as otherwise herein provided* (emphasis added)."

ject of acreage limitations played a controversial role, contains repeated statements by both proponents and opponents of the Act to the effect that the language contained in § 14 does not incorporate the acreage limitation provisions of the reclamation law. *See, e.g., Colorado River Basin: Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation,* 69th Cong., 1st Sess., 32-33 (1926); S. Rep. No. 592, 70th Cong., 1st Sess., pt. 2, at 26 (1928); 69 Cong. Rec. 7634-7635, 9451, 10471, and 10495 (1928); 70 Cong. Rec. 289 (1928).

The Decisions Below

The District Court, after trial, entered judgment against the United States, holding that acreage limitations do not apply to private lands within the District. 332 F. Supp., at 11. Respondents applied for leave to intervene to appeal in the event the United States decided not to appeal. The District Court denied leave to intervene for this purpose, and the United States decided not to appeal. Solicitor General Griswold explained:

> "I considered the matter carefully and thoroughly, and over a considerable period of time. As a result of my consideration, I became convinced that (a) we would not win the case in the court of appeals, and (b) *we should not win it.* In this situation, I came to the conclusion that it was my duty as a responsible officer of the government not to authorize an appeal." 117 Cong. Rec. 46228 (1971) (emphasis added).

Respondents appealed the order denying leave to intervene. In the meantime, respondents in a separate case obtained a District Court decision (by another judge)

that the "residency requirement" [13] of § 5 of the Reclamation Act of 1902 applies to lands within the District. *Yellen, et al.*, v. *Hickel*, 335 F. Supp. 200 (S.D. Cal. 1971); 352 F. Supp. 1300 (S.D. Cal. 1972). There, respondents alleged that they would be able to buy land at below market value if the residency requirement of § 5 were applied. The Court of Appeals then reversed the order denying intervention in the present case on the basis that there might be two conflicting decisions in the Ninth Circuit. 559 F.2d, at 543.

The two cases ("residency" and "acreage") were calendared for argument before the same panel. Almost three and one-half years after argument, the Court of Appeals ordered dismissal of the residency case for lack of standing, but reversed the District Court's judgment in the acreage case as to both standing and the merits. 559 F.2d, at 509. Its rationale was that § 14 of the Project Act, by its references to the reclamation law, subjected all privately owned lands to the excess lands provisions of the reclamation law, identifying § 46 of the Omnibus Adjustment Act of 1926 as the operative statute. It held that the "present perfected rights" referred to in § 6 of the Project Act were rights of the District, not its landowners, and that the District could "redistribute" its water if excess landowners refused to sell at prices fixed by the Secretary of the Interior. As to standing, the court held that respondents' interest in buying land at less than market value was sufficient to create standing. Petitions for rehearing, filed in September of 1977, were denied 21 months later, in April of 1979. 595 F.2d, at 524. This

[13] "[N]o such sale [of a right to the use of water for land in private ownership] shall be made to any landowner unless he be an actual bona fide resident on such land . . . ." 32 Stat. 389.

petition for certiorari follows. Respondents in this case have not filed a petition for certiorari in the residency case.

In *Arizona* v. *California,* 373 U.S. 546 (1963), this Court gave particular attention to the subject of "present perfected rights" (pp. 566, 581, 583, 584, 588, and 594), holding them to be excluded from the Secretary's power to allocate water under the Project Act. The Court, in its 1964 decree, 376 U.S. 340, defined the term (see n. 2, *supra*), and required the Secretary to so operate all federal works (*e.g.,* Hoover Dam and the All-American Canal) as to satisfy them. In its 1979 decree, the Court determined the present perfected rights in Arizona, California and Nevada, including those of the District (see n. 1, *supra*). Their significance, in the present case, is that it has been adjudicated that 424,145 acres in the District (97 percent of the total area now irrigated) were being irrigated from the Colorado River some 50 years ago, before the enactment of the Project Act, and the Secretary is directed by this Court's opinion and decrees to deliver the water required to satisfy those rights. This acreage includes all of the excess lands involved in the present controversy.

The primary question now being litigated is whether the Secretary is empowered to refuse to deliver water from the All-American Canal for use on those lands, in excess of 160 acres per landowner, unless the owner agrees to sell the excess at prices fixed by the Secretary.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Conflicts With This Court's Opinion and Decrees in *Arizona* v. *California*

First, the Court of Appeals' decision cannot be put into operation without conflicting with this Court's opinion in *Arizona* v. *California, supra,*[14] and its adjudication of the District's "present perfected rights" in the 1979 decree. Second, the Court of Appeals' decision conflicts with this Court's 1964 decree respecting allocation of water in the event of shortages.

A. As to "present perfected rights" decreed by this Court

"Present perfected rights" must be satisfied from water stored behind Hoover Dam. These rights, by definition, were perfected by actual use as of 1929 when the Project Act became effective. The 1979 decree fixes the amount of water which the Secretary must deliver to the District at 2,600,000 acre-feet year or enough water to irrigate 424,145 acres—whichever quantity is less—with a priority date of 1901. That is to say, all of the lands which would be denied water by the Court of Appeals have been irrigated for more than 50 years, pursuant to appropriations made 78 years ago.

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[14] The significance of "present perfected rights," as rights acquired under state law, not dependent upon or subject to reduction by the Secretary's allocations of water, received repeated attention in this Court's opinion in *Arizona* v. *California,* 373 U.S. 546, 566, 581, 583, 584, 588, 594 (1963). Thus, in rejecting the argument that appropriations under state law governed the Secretary's allocation of water, the Court said: "[W]e are persuaded that had Congress intended so to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms, *as it did in recognizing 'present perfected rights' in § 6.*" *Id.,* at 581 (emphasis added).

The Court of Appeals says that the application of acreage limitations to privately owned lands in the District will not impair present perfected rights because the District can "redistribute its deliveries if certain lands became ineligible for delivery of water." 559 F.2d, at 529.

That statement is plainly wrong. The District *cannot* redistribute water within its boundaries for reasons both factual and legal. There is no place in the District on which to put water taken away from the "excess" acreage now irrigated.[15] All irrigable private land—438,000 acres—is already under irrigation (424,145 acres of this is in decreed present perfected rights).

The Court of Appeals makes two interlocking errors (i) in failing to recognize that under California law the rights of landowners to water delivered by irrigation districts are property rights,[16] not amorphous mem-

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[15] 233,000 acres, or 55 percent of the 424,145 acres irrigated prior to the Project Act, are said by the Court of Appeals to be owned by "excess landowners." 595 F.2d, at 530, n. 6.

[16] The California Supreme Court has described the nature of California water rights owned by an irrigation district in trust for landowners as follows:

> "[T]he beneficiaries of the trust, who, upon familiar equitable principles, are to be regarded as the owners of the property, are the landowners in the district, with whose funds the property has been acquired (Civ. Code, § 853), and in whom, indeed, is vested by the express provisions of the statute, in each, the right to the several use of a definite proportion of the water of the district, and in all, in common, the equitable ownership of its water rights, reservoirs, ditches, and property generally, as the means of supplying water. St. 1887, pp. 34, 35, §§ 11, 13. Such rights as these cannot be distinguished in any way from other private rights, and therefore clearly come within the protection of the provision of section 13 of article 1 of the state Constitution—that 'no person shall be * * * deprived of * * * property without due process of law,' and

berships in a class; and (ii) in failing to recognize that under federal law the rights of landowners are rights which the Project Act directs the Secretary to serve, and precludes him from taking. This Court's two decrees in *Arizona* v. *California* implement that mandate.

The court's conclusion that the application of acreage limitations to individual landowners (as distinguished from the District) would not impair present perfected rights is premised on a misunderstanding of the nature of water rights "owned" by irrigation districts in California. Although it is true that the District holds the legal title to the water rights, it holds this title in trust for the landowners, who own the beneficial interest. It is the individual landowner—not the District—who puts the water to beneficial use. Under California law, each individual landowner has a statutory right to a definite proportion of the District's water.[17] And each individual landowner has a statutory right to assign his proportionate share.[18] Moreover, the right to

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of the similar provision of section 1 of the fourteenth amendment to the Constitution of the United States." *Merchants' National Bank of San Diego* v. *Escondido Irrigation District*, 144 Cal. 329, 334, 77 P. 937, 939 (1904).

[17] "*Basis of apportionment among landowners.* All water distributed by districts for irrigation purposes shall except when otherwise provided in this article be apportioned ratably to each landowner upon the basis of the ratio which the last assessment against his land for district purposes bears to the whole sum assessed in the district for district purposes." Cal. Water Code Ann. § 22250 (West 1971).

[18] "*Assignment of right.* Any landowner may assign for use within the district his right to the whole or any portion of the water apportioned to him pursuant to Section 22250." *Id.*, at § 22251.

such proportionate share becomes appurtenant to the land on which the water is used.[19]

Section 6 of the Project Act requires the Secretary to satisfy present perfected rights, and § 13(d) provides specifically that the rights assured by the Colorado River Compact, *e.g.*, present perfected rights, "run with the land," "and shall be deemed to be for the benefit of and be available to" the States of the Basin "and the users of water therein . . . by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River . . . ." [20]

Present perfected rights are rights "acquired in accordance with state law." 376 U.S., at 341. Thus, the Project Act's mandate that present perfected rights be satisfied requires that in California such rights be satisfied with respect to individual landowners and their lands.

The notion that the District alone is protected against impairment of present perfected rights, and not the landowners who are the equitable owners of those rights under the laws of California, is also in collision with § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 372, 383. Section 8 not only requires the Secretary to observe and respect rights vested under state law, but also, in its overriding pro-

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[19] "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another." Cal. Civ. Code, § 662.

[20] "This section was re-enacted in the Boulder Canyon Project Adjustment Act, 54 Stat. 779, § 14 (1940).

viso, states a principle which is echoed, often in the same words, in the law of every Western State:

> "[T]he right to the use of water . . . shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." [21]

In *Ickes* v. *Fox*, 300 U.S. 82 (1937), this Court rejected the notion that ownership of water rights vests in an appropriator who diverts, stores and distributes water for use by another.[22] There, the United States was the

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[21] 43 U.S.C. § 372. The only mention of § 8 in the Court of Appeals' opinion is in a footnote, 559 F.2d, at 528, n.37, which cites the dictum in *Arizona* v. *California*, 373 U.S. 546, 586-587 (1963), which this Court disavowed in *California* v. *United States*, 438 U.S. 645, 674-675 (1979). The Court of Appeals relies heavily on *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958), and *Fresno* v. *California*, 372 U.S. 627 (1963). This Court, in *California* v. *United States*, said that *Ivanhoe*, like *Fresno*, went "further than was necessary" in restricting the scope of § 8 of the Reclamation Act. 438 U.S., at 673. Mr. Justice Harlan, dissenting, in *Arizona* v. *California*, 373 U.S. 546, 623-624, criticized what he called the dictum in *Ivanhoe* "that § 8 applies only to the acquisition of rights by the United States and not to its operation of a dam," in terms which foreshadowed the later disavowal in *California* v. *United States* of that dictum. 373 U.S., at 586-587. Mr. Justice Harlan also made the point that § 14 of the Project Act, providing "that the Reclamation Act shall govern the operation of Hoover Dam except as the Project Act otherwise provides," had the effect of incorporating § 8 of the Reclamation Act into the Project Act. *Id.*, at 623.

[22] This Court said:

> "Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water-rights be-

appropriator, as the District is in this case, but the water right was held to run with the land, per § 8 of the Reclamation Act, and to be enforceable by the landowner. See *Fox* v. *Ickes,* 137 F.2d 30 (D.C. Cir. 1943). This Court cited *Ickes* v. *Fox* with approval in its opinion in *Arizona* v. *California, supra,* at 585, n.86, as establishing the criterion for operation of the Boulder Canyon Project.

Thus, the notion that the District alone is protected against impairment of present perfected rights, and not the landowners who are the equitable owners of those rights under the law of California, conflicts with both § 13 of the Project Act and § 8 of the Reclamation Act of 1902.[23]

B. As to water decreed by this Court in addition to "present perfected rights"

Article II(B)(3) of the 1964 decree, 376 U.S. 340, directs the Secretary, in the event of shortage in the allocated quantities, to allocate the remaining available water among three states "after providing for satisfac-

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came the property of the landowners, wholly distinct from the property right of the government in the irrigation works." 300 U.S., at 94-95.

[23] In *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725 (1950), the Court said this about § 8 of the 1902 Act:

"By its command that the provisions of the reclamation law should govern the construction, operation, and maintenance of the several construction projects, Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws." *Id.,* at 734.

This is substantially the language of § 14 of the Project Act, relied upon by the Court of Appeals in reaching the opposite conclusion that vested rights in excess of 160 acres per landowner are not entitled to "full recognition."

tion of present perfected rights in the order of their priority dates without regard to state lines." *Id.*, at 342. The Secretary manifestly cannot make any such allocation until he first knows the magnitude and priorities of the present perfected rights which must be protected, and hence how much remaining water there may be. Present perfected rights account for about two-thirds of California's apportionment of 4,400,000 acre-feet of the first 7,500,000 acre-feet available for consumptive use in Arizona, California and Nevada.[24] But to the extent the 424,145 acres referred to in the 1979 decree are denied a right to water, the Secretary will be unable to satisfy the decreed "present perfected rights" in the District, and the question of how much water he must reserve for California in that category becomes hopelessly muddled.

II. The Retroactive Decision of the Court of Appeals Conflicts with the Principles of Finality of Judicial and Administrative Determinations Which Have Been Laid Down by this Court.

Any conceivable uncertainty over excess land laws which might have existed after the Project Act became effective in 1929 was explicitly resolved by resort to all the methods which the English common law, federal statutory law, and United States constitutional law afford: express contract, regulation, administrative interpretation, and *res judicata.*

Actions by the Department

It had to be decided, and was decided, before the All-American Canal was built, whether the acreage

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[24] See *Arizona* v. *California,* — U.S. —, 99 S. Ct. 995, 1000-1005 (1979).

limitations were applicable to Imperial Valley. It is clear beyond peradventure that the 1932 contract between the United States and the District was intended by the parties who negotiated it to determine that acreage limitations were not applicable to privately owned lands in the District. The Secretary of the Interior, who was named by Congress as the responsible official to contract for the United States, said so in a formal writing. His successors continued to say so in a variety of ways.

Secretary Wilbur had the task of "making the parts work efficiently and smoothly while they are yet untried and new." [25] He was the officer whom the Project Act vested with responsibility and authority to negotiate the contracts which § 4(b), in conjunction with § 5, made prerequisites to obtaining appropriations for the construction of Hoover Dam and the All-American Canal. He had to construe a new statute which contained directions that were not altogether consistent with one another, as this Court's opinion in *Arizona* v. *California, supra,* so clearly demonstrates. It was clear, however, as this Court later reaffirmed in *Arizona* v. *California,* that he was required by § 6 to so operate Hoover Dam as to satisfy present perfected rights, and § 13 made these rights run with the land. The history of negotiation of Article VIII of the Colo-

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[25] Cf. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294 (1933) where this Court said:

> ". . . administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. . . . The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Id.,* at 315.

rado River Compact, in which the term "present perfected rights" first appeared, and of the Project Act, make it clear that this language came into existence to protect the long-standing irrigation economy of Imperial Valley. As to acreage limitations, the only provision in the Act is § 9, which was specifically limited to public lands that would be newly opened to entry. And the legislative history of the Project Act showed at least six efforts to amend one or the other of the four successive Swing-Johnson bills to add a land limitation on private lands to the bill at a time when § 14 or its predecessor was in the bill. All of these efforts were ultimately unsuccessful.

Secretary Wilbur found clear directions that vested rights must be respected when water is delivered through federal works, even the rights of "excess" lands. Section 8 of the 1902 Act provided that nothing in that act "shall be construed as affecting . . . the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, *or any vested right acquired thereunder* . . . (emphasis added)." Accordingly, it had been the Department's practice, since at least 1905, to "flow through" water required to satisfy vested rights which preexisted the construction of a project. A 1910 regulation of the Department on this subject was on the books. 38 L.D. 637. *It is still in force.* It provides:

> "The provision of section 5 of the act of June 17, 1902 (32 Stat. 389; 43 U.S.C. 381, 392, 431, 439), limiting the area for which the use of water may be sold, does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works con-

> structed by the Government under appropriate regulations and charges." 43 C.F.R. § 230.70.

Accordingly, Secretary Wilbur, in the negotiation of the All American Canal contract, determined that the contract should contain only the limitation on public lands required by § 9 of the Project Act, and none on private lands.

He said:

> " 'Early in the negotiations connected with the All-American Canal contract the question was raised regarding whether and to what extent the 160-acre limitation is applicable to lands to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right. These lands, having already a water right, are entitled to have such vested rights recognized without regard to the acreage limitation mentioned. Congress evidently recognized that these lands had a vested right when the provision was inserted that no charge shall be made for the storage, use, or delivery of water to be furnished these areas.' " [26] 332 F. Supp., at 23. The entire ruling is reproduced in the Appendix at p. 213a.

He went on to cite Departmental precedents.

This ruling was submitted to the court in the then pending validation proceeding, *Hewes* v. *All Persons*.

Secretary Harold L. Ickes took office March 4, 1933, just before the hearing in the *Hewes* case. The contract,

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[26] The Court of Appeals points out that this letter refers to § 5 of the Reclamation Act of 1902, not § 46 of the Omnibus Adjustment Act of 1926. But this Court, in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 290 (1958), characterized the latter as a reenactment of the former.

because of the validation requirement, had not yet gone into effect. Far from intervening in *Hewes* to repudiate Secretary Wilbur's interpretation, Secretary Ickes (whom President Roosevelt appointed to serve also as Public Works Administrator), allocated P.W.A. funds for the construction of the All-American Canal as soon as the termination of the validation litigation permitted. He so reported to the President and the Congress. Annual Report of the Secretary of the Interior, F.Y. 1933. He continued for nine years to allocate P.W.A. funds or to submit justifications for appropriations to construct the All-American Canal until it was completed in 1942. For 34 years this interpretation was regarded as a rule of property by landowners in the purchase and sale of lands, by the Department of the Interior, and (on the Department's advice) by other federal agencies, including those which lent money in Imperial Valley.

In *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915), this Court said:

> "It may be argued that while these facts and rulings prove a usage, they do not establish its validity. But government is a practical affair, intended for practical men. Both officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department, on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,—even when the validity of the practice is the subject of investigation." *Id.*, at 472-473.

This criterion would seem to be fully satisfied by 34 years' adherence by six Secretaries, in four Presidential administrations, to the ruling made by the Secretary who had the responsibility for putting the Project Act into motion.

As the District Court pointed out:

> "Congress for more than 30 years was fully aware of the 1933 ruling and interpretation of Secretary Wilbur and of the administrative practice predicated thereon. The Imperial Valley situation in light of such interpretation and practice was called to its attention in appropriation hearings for the construction and operation of the All-American Canal, at the hearings on the Central Valley and San Luis projects and at the hearings on the Small Projects Act of 1958." 322 F. Supp., at 27.

Congress repeatedly appropriated large amounts for the construction and operation of the All-American Canal, and took no action to reverse the known policy of the Interior Department with respect to Imperial Valley.

Judicial Determination: The Hewes Case

As required by § 1 of the Act of May 15, 1922, 42 Stat. 541, 43 U.S.C. § 511, the Imperial contract was submitted to a state court of competent jurisdiction for determination of the District's authority to execute it.[27] *Hewes* v. *All Persons.* An objecting landowner, in his answer, put in issue the questions of (i) whether the reclamation law required that the contract contain a land limitation applicable to private owners, (ii) if so,

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[27] Art. 31 of the contract incorporates the language of the 1922 statute.

whether this contract by its cross-reference to the reclamation law imposed such a limitation, (iii) whether the District had authority to enter into such an agreement, and (iv) related constitutional issues.

The state court, after trial, decided all of these issues in favor of the validity of the contract, and rejected the contention that the land limitations in the reclamation law were incorporated by reference in the contract and therefore were applicable to lands in the District.[28]

It would appear to be beyond question that the state court's determinations must be accorded full faith and credit in the courts of the United States. 16 U.S.C. § 1738. The Court of Appeals, however, refused to do so. The court in its opinion acknowledged that the *in rem* validation proceeding was *res judicata* and foreclosed "further inquiry into the matters to which the judgment properly relates." 559 F.2d, at 525. However, it characterized the determination with respect to acreage limitations as "pure dicta." *Id.*, at 526.

The court's promise that the contract would have been valid whether or not the reclamation law required the application of acreage limitations in the District is untenable. The parties to the contract were in agreement that the contract did not authorize acreage limitations on privately owned lands in the District. Secretary Wilbur had confirmed this. Thus, if the *Hewes* court had decided that the reclamation law required acreage limitations on private lands in the District, it necessarily would have held the contract invalid as

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[28] See Appendix at p. 120a.

failing to conform to that law.[29] The Court of Appeals purports to take its view of the effect of validation proceedings from the California Supreme Court's opinion in *Ivanhoe Irrigation District* v. *All Parties & Persons,* 47 Cal. 2d 597, 306 P.2d 824 (1957), *reversed sub nom., Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958), declaring that a validation proceeding "within its legitimate issues [is] . . . binding on the world at large." 559 F.2d, at 525. The Court of Appeals held, however, that there can be only one such issue, the contract's validity.[30]

The Court of Appeal's error is in the implicit assumption that abstract "validity" can be usefully decided while divorced from any determination of what, if anything, the contract obligates its parties to do or not to do. An opinion by a California court declaring that "This contract is valid, and binding on all the world, but what the contract binds any party to do or to refrain from doing, and what if any remedy might be available, is beyond any issue reached," would be a useless absurdity.

The purpose of the 1922 statute requiring validation proceedings as a condition to the effectiveness of a federal contract under the reclamation law was to establish finality as against both parties to that contract—the United States and the irrigation district

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[29] In *Ivanhoe,* which was relied on by the Court of Appeals, the parties to the contract were in agreement that the acreage limitation provisions of the reclamation law *were* applicable, and the contract explicitly so stated.

[30] In *Ivanhoe* vested water rights were not involved:

> "It is interesting to note that irrigators in this district receive water diverted from the San Joaquin in which they never had nor were able to obtain any water right." 357 U.S., at 285.

—*before* the former spent money to construct a project, and the latter became obligated to repay its cost.[31] This necessarily included the adjudication of every issue raised in that validation proceeding against the enforceability of the obligations of either of them.[32]

Every device known to the law was employed to make the agreement between the District and the United States effective and certain. If they failed—and clearly both they and the Department with whom they dealt did fail if the Court of Appeals' decision is allowed to stand—there is no mechanism known to the law by which such an agreement can be made certain. Contemporaneous construction, contract, long-continued reliance, and even the strongest legal cement available —*res judicata*—are all rendered ineffective retroactively, decades after the fact.

The importance of finality is not confined to the present case. It is not even confined to the many projects in Arizona, Nevada, and California served by water

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[31] The United States has at times contended that a state court can have no jurisdiction to determine anything about rights in water to which the government claims ownership and control. That argument was conclusively disposed of in *United States* v. *District Court for Eagle County*, 401 U.S. 520 (1971). Congress can give a state court jurisdiction to decide whatever Congress by statute provides. 43 U.S.C. § 511 is meaningless if it does not dispose of any objection to a California court deciding, as expressly it did in *Hewes* v. *All Persons*, that the District's contract is valid and does not limit the acreage of privately owned farms.

[32] In *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), this Court, speaking of the finality to be accorded under the Federal Power Act to a court of appeals review of an order of the Federal Power Commission, said: "Such statutory finality need not be labeled res judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts." *Id.*, at 337.

stored in Hoover Dam under the Project Act.[33] It extends to all projects in the 17 Western States in which 43 U.S.C. § 511 was thought to have brought about a determination of the validity of contractual provisions before the project was built.

What might have been achieved under a limitation beginning in 1932 need not now be decided. It is clear that all who have acquired lands in Imperial Valley since the Project Act was authorized 50 years ago have paid prices determined by a market in which the value of the project to the land has been fully capitalized. Taxes and mortgage interest have been paid for several decades on values which include value added by the project. If a wrong has been committed, it is a wrong to today's generation which has paid excess prices, taxes, and interest. If there were speculators, they were speculators of the 1930s, not of the 1970s, who sold and took the windfall with them. Today's landowners paid full value. The United States suit to deny today's irrigators water served by the Project is like imprisoning the victim of a robbery rather than the robber.

III. The Decision Below Expands the Concept of "Standing" on an Unjustifiable Scale, to Include All Persons in the United States Who Might Profit From the Secretary's Power to Fix Prices of "Excess Lands" at Less Than Market Value on Forced Sale. If Such Authority Ever Existed as to Lands in the District, It Terminated on March 1, 1978

We contend that (i) the respondents never had standing, and (ii) if they ever had standing, it ended

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[33] Palo Verde Irrigation District and the Metropolitan Water District are both contractees under the Project Act, and neither has ever been held subject to any excess land law.

with the termination of the Secretary's authority to fix prices on the sale of excess lands, which occurred in this case, March 1, 1978.

A. The Court of Appeals' opinion would expand the concept of standing on an unjustifiable scale

Respondents' only interest is that of citizens in general. They do not allege, and could not allege, any preference as against potential purchasers anywhere else in the United States. Inasmuch as respondents had no more direct interest in the case than, say, residents of Chicago who might, like them, see a chance for a windfall at the expense of the landowners, their status is somewhat less than that of private attorneys general seeking to second-guess the Solicitor General of the United States in his perception of the merits, after he had withdrawn the United States from the case.[34]

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[34] In the companion "residency" case the Court of Appeals, in the same opinion that is addressed by this petition for certiorari, held that these same respondents lacked standing. It gave as its reasons:

> "Furthermore, any relief that could appropriately be ordered in this case would not redress plaintiffs' alleged injuries. The most that could be ordered is a discontinuance of deliveries of water to lands owned by nonresidents. Nonresident landowners could not be forced to sell their lands. Some lands owned by nonresidents might be turned to industrial or residential uses. . . . Land placed for sale by nonresidents could be purchased by residents other than the plaintiffs or by nonresidents who wished to move to the area in order to obtain farm land. These two groups of prospective purchasers would compete with plaintiffs for the purchase of available farm lands and drive up prices." 559 F.2d, at 519.

The difference in the court's decisions in the residency and acreage cases is explainable only because the Secretary was believed to be empowered to fix sale prices in the acreage case, but not in the residency case. He lost this authority when the District completed payment of half of construction charges.

The Court of Appeals might well have quoted its own language in *Turner* v. *Kings River Conservation District,* 360 F.2d 184 (9th Cir. 1966):

> "Moreover, the statutes [§ 46 of Omnibus Adjustment Act of 1926 and § 5 of Reclamation Act of 1902] imposed a duty upon the Secretary of Interior in the interest of the public at large, and there is nothing in the statutes to indicate that Congress intended to confer a litigable right upon private persons claiming injury from the Secretary's failure to discharge his duty to the public." *Id.,* at 198.

B. More than one-half of the construction charges against all lands have been repaid

The standing of respondents—intervenors after the District Court's judgment went against the United States—was predicated wholly on the allegation that these particular people would benefit if the Secretary were enabled to fix prices at less than market value on the forced sale of excess lands.[35] But the Secretary's authority to fix prices, if he ever had it with respect to lands in the District, expired on March 1, 1978. Section 46 fixes a termination date on the Secretary's price-fixing authority in these terms:

> "[*U*]*ntil one-half the construction charges against said lands shall have been fully paid* no sale

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[35] This a suit to enforce § 46 of the 1926 Act, not a suit to enforce § 5 of the Reclamation Act which also imposes a land limitation. The Court of Appeals was careful to make this distinction. 559 F.2d, at 537. The distinction was necessary because the court held that these same respondents lacked standing to sue to enforce the residency requirements of § 5. See 559 F.2d, at 517. It would have strained the imagination to discover that respondents had standing nevertheless to enforce the acreage limitation in that same section. But see *Ivanhoe Irrigation District* v. *McCracken,* which referred to the 1926 Act as a "reenactment" of Sec. 5 of the 1902 Act. 357 U.S. 275, 290 (1958).

> of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior . . . . (emphasis added.)"

On March 1, 1978, the District completed repayment of more than one-half of the construction charges against all lands in the District. Counsel for the District informed the Court of Appeals, in the petition for rehearing, that this event was imminent.[36]

The Secretary's authority to set prices for land having terminated when the District repaid 50 percent of the costs, the controversy became moot as to these respondents since the remedy which they sought was no longer available. The rule that the federal judiciary will not review moot cases is derived from the Article III requirement that the exercise of judicial power depends upon the existence of a case or controversy. Courts are guided by the familiar propositions that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them," *North Carolina* v. *Rice,* 404 U.S. 244, 246 (1971), and "when, pending an appeal from the judgment of a lower court . . . an event occurs which renders it impossible for this court . . . to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." *American Book Company* v. *Kansas,* 193 U.S. 49, 52 (1904), *quoting Mills* v. *Green,* 159 U.S. 651, 653 (1895). *Cf. DeFunis* v. *Odegaard,* 416 U.S. 312 (1974).

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[36] The petition for rehearing en banc was filed September 8, 1977. The amounts involved are stated in the affidavit of Robert F. Carter, reproduced in the Appendix at p. 243a.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari be granted.

Respectfully submitted,

REGINALD L. KNOX, JR.
HORTON, KNOX, CARTER & FOOTE
Law Building, Suite 101
895 Broadway
El Centro, California 92243
(714) 352-2821

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
WILLIAM H. BURCHETTE
LAW OFFICES OF NORTHCUTT ELY
Watergate 600 Building
Washington, D.C. 20037
(202) 342-0800

Attorneys for Imperial Irrigation District

Of Counsel:

CHARLES E. CORKER
4128 55th Avenue, N.E.
Seattle, Washington 98105
(206) 523-9264

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